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IN THE
Supreme Court of the United States

OCTOBER TERM, 1962

No. 48

FEDERAL POWER COMMISSION, *Petitioner*,

v.

TENNESSEE GAS TRANSMISSION COMPANY, THE MANUFACTURERS LIGHT AND HEAT COMPANY, THE OHIO FUEL GAS COMPANY and UNITED FUEL GAS COMPANY, *Respondents*.

No. 50

CITY OF PITTSBURGH, PENNSYLVANIA, *Petitioner*,

v.

TENNESSEE GAS TRANSMISSION COMPANY, THE MANUFACTURERS LIGHT AND HEAT COMPANY, THE OHIO FUEL GAS COMPANY and UNITED FUEL GAS COMPANY, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals
for the Fifth Circuit

**BRIEF FOR RESPONDENT TENNESSEE GAS
TRANSMISSION COMPANY**

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OPINIONS BELOW

The opinions of the Court of Appeals for the Fifth Circuit (R. 635-646) are reported at 293 F. 2d 761. The orders of the Federal Power Commission (R. 524-540, 587-591)¹ are reported at 24 F.P.C. 294 and 525.

¹ The record references "(R. 524-540)" are to the pages of the Joint Appendix.

JURISDICTION

The jurisdictional requisites are adequately set forth in the briefs for the petitioners.

QUESTIONS PRESENTED

(1) Does the Federal Power Commission have authority under Section 4 of the Natural Gas Act to set aside filed individual zone rates, and to order reductions in rates and refunds prior to a determination of the zone allocation issue which is an inseparable part of determining whether the filed individual zone rates are just and reasonable?

(2) Where the issue of zone allocation has been thoroughly tried and briefed and is awaiting decision, did the Commission abuse its discretion in failing to decide that issue prior to ordering an interim reduction in rates and refunds where such action could in fact deprive Tennessee Gas Transmission Company of earning the rate of return prescribed by the Commission's interim order?

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717-717w, are set out in Appendix A to the Brief for Petitioner in No. 48.

STATEMENT OF THE CASE

Tennessee Gas Transmission Company (Tennessee) owns and operates a natural gas pipeline system extending some 2,200 miles in a northeasterly direction from its sources of supply in Texas and Louisiana traversing sixteen states² and terminating in New England. The area in which Tennessee transports and

² Tennessee's pipeline system extends through Texas, Louisiana, Arkansas, Mississippi, Alabama, Tennessee, Kentucky, West Virginia, Ohio, Pennsylvania, New Jersey, New York, Massachusetts, New Hampshire, Rhode Island and Connecticut.

sells natural gas is divided into six rate zones for rate-making purposes, with rates differing among the zones to give effect to distance of transmission from source of gas supply and other factors.

Tennessee, on October 5, 1959, filed schedules of increased rates for each zone with the Federal Power Commission (R. 502-504). The major reason for such filing was to recover the increased cost to Tennessee of natural gas purchased from producers who had filed increased rates with the Commission (R. 503).³

Additionally, Tennessee's rates reflected increases in taxes, wages and the cost of debt capital incurred in financing expansions of pipeline capacity approved by the Commission (R. 503). Since the interest cost on long-term debt is considered by the Commission as an integral part of the over-all return allowance, Tennessee's rates reflected an increase in the rate of return on its investment to 7 percent solely to recover the increased cost of such debt. No increase in the return previously allowed by the Commission to common stockholders was requested.⁴

³ For example, investigation by the Commission's Staff revealed that Tennessee's actual cost of purchased gas was 18.23¢ per Mcf for the first six months immediately following the month in which Tennessee's rates became effective (April, 1960), as compared to a unit cost of 14.55¢ per Mcf for the 12 months ended July, 1959 (the test year). Based on the volume of gas purchased during the test year (688,354,803 Mcf) this represented an increase of approximately \$25,000,000 in the cost of purchased gas. *Tennessee Gas Transmission Company*, Docket No. G-19983, Examiner's Decision issued May 28, 1962, pages 3, 6-7 (unreported).

⁴ In Tennessee's last decided rate case, the Commission found that a 6% over-all return, which yielded a 13.71% return on Tennessee's common equity investment, was reasonable. *Tennessee Gas Transmission Company*, 18 F.P.C. 428, 430, 439, 441 (1957). In the case at bar, due to the increase in cost of debt, a 7% over-all return yielded a 13.98% return on Tennessee's common equity, as found by the Commission in the order under review (R. 530).

By order issued November 4, 1959, the Commission suspended the effective date of the increased rates and ordered a hearing to determine the "lawfulness" of the rates which had been filed (R. 502-505). Following a five-month period of suspension, the rates became effective April 5, 1960, subject to an undertaking by Tennessee, required by Commission order, to (R. 505-503):

*** refund at such times and in such manner as may be required by final order of the Commission, *the portion of the increased rates found by the Commission in this proceeding not justified, together with interest thereon at the rate of 7 percent per annum* ***⁵

Hearings commenced on February 2, 1960, and continued intermittently until recessed on May 25, 1960. At such hearings Tennessee presented its evidence on cost of service including evidence as to rate of return. The Commission Staff and one intervenor presented evidence limited solely to the question of rate of return. At the conclusion of this portion of the hearings, Commission Staff counsel moved that the hearing be divided into two phases, the first phase to deal solely with the issue of rate of return, and the remaining issues to be reserved for a later stage of the proceeding. Staff counsel further proposed that upon completion of the first phase of the proceeding, the Examiner's decision be omitted; that the Commission issue a decision determining the fair rate of return for Tennessee; and that the Commission issue an interim order requiring Tennessee to reduce its rates and make refunds, in the event the Commission should conclude that the fair

⁵ Unless otherwise indicated, emphasis is supplied throughout this brief.

rate of return is less than claimed by Tennessee (R. 377-378).

When Staff counsel made his motion, there was pending before the Commission in the instant proceeding, and in another pending rate proceeding involving Tennessee (Docket No. G-11980), the zone allocation issue, which, when resolved, would for the first time determine the method to be used in allocating Tennessee's cost of service among its six rates zones and various classes of services. Almost a year and one-half prior to the interim order in this case, the Commission had ruled that determination of the allocation issue should be expedited and, to that end, severed that issue for separate and prior hearing and determination in Docket G-11980.⁶ At the time Staff counsel made his motion, the allocation issue had already been tried and briefed and was awaiting decision by the Examiner. Additionally, the Examiner in the instant proceeding, who is also the Examiner in Docket G-11980, had ruled that the determination of the allocation issue in Docket G-11980 would govern the method of allocating Tennessee's cost of service in this case (R. 50-1).⁷

Since determination of the allocation issue is required in order to translate the cost of service into rates for the various zones and services, Tennessee opposed the Staff's motion for an interim order on the

⁶ *Tennessee Gas Transmission Company*, Docket G-11980, order issued April 30, 1959 (unreported).

⁷ The Commission subsequently held that the decision on zone allocation in Docket No. G-11980 would apply to the case at bar and future cases, *Tennessee Gas Transmission Company*, 42 PUR 3d 145, 150 (1962), pending on review, *sub nom. Manufacturers Light and Heat Co. v. F.P.C.*, CADC No. 17064.

ground, *inter alia*, that such order would be illegal unless the Commission simultaneously determined the allocation issue (R. 591-606). On July 19, 1960, Tennessee filed a motion with the Commission requesting it to determine the allocation issue simultaneously with the issue of rate of return (R. 519-521). By order issued August 5, 1960, the Commission denied Tennessee's motion (R. 521-523).⁸

On August 9, 1960, the Commission issued its interim order, here involved, adopting the Staff's proposed procedure. Although the Commission found that the evidence supported Tennessee's claimed increase in cost of debt (R. 529), it denied Tennessee the rate of return requested. Instead of increasing the over-all rate of return to compensate for this increase in cost of debt, the Commission reduced the return on common stock equity 26% below that previously allowed as reasonable⁹ and thereby arrived at a 6½% over-all return instead of the 7% over-all return requested by

⁸ Petitioner in No. 48 (Br. p. 5) alleges that the motion filed by Tennessee was untimely since it was not filed within five days after the close of hearings on the allocation issue, but fails to mention that it was not denied on that ground. Moreover, good cause to omit the intermediate decision on allocation did not arise until the Staff made its motion for an interim decision on rate of return in the case at bar. The Staff's motion was not made until May 25, 1960, (R. 377-8), whereas hearings on the allocation issue were concluded on December 17, 1959. Tennessee had no reason to move for omission of the intermediate decision on allocation until the Staff moved for omission of the intermediate decision on rate of return in the case at bar.

⁹ As stated above, in *Tennessee Gas Transmission Company, supra*, 18 F.P.C. at 430, 441, the Commission found that a 13.71% return on common equity was reasonable. In the instant case, the Commission reduced the return on common equity to 10.12% (R. 534).

Tennessee. The Commission's order required Tennessee to file reduced rates effective retroactively to April 5, 1960, and required Tennessee to make refunds of the differences in rates collected since April 5, 1960 (R. 524-540).

The Commission, however, failed to make any determination as to the proper method of cost allocation which should be employed in allocating the reduced over-all cost of service, resulting from its 6 1/8% rate of return allowance, among the six rate zones and various classes of service on the Tennessee system. Nor did the Commission make a determination or findings as to which of the various zone rates filed by Tennessee were unlawful, which rates should lawfully be reduced, or to whom refunds were lawfully due. Instead, the Commission left these crucial questions open for later decision, even though such later decision might result in a determination that Tennessee had reduced rates in various zones, pursuant to the interim order, which were in fact lawful in the first instance and had made refunds in the wrong amounts to the wrong customers.

Tennessee timely applied for a rehearing of the Commission's order (R. 544-576). On September 27, 1960, the Commission denied Tennessee's application for rehearing (R. 585-591).

On October 3, 1960, Tennessee filed its Petition to Review with the Fifth Circuit Court of Appeals.¹⁰ By its decision issued August 2, 1961, the Court upheld the

¹⁰ Tennessee simultaneously filed a motion for stay of the Commission's order, which was denied, Judge Wisdom dissenting. (R. 632-633).

Commission's substantive determination as to rate of return, but it held that the Commission erred in requiring a reduction in rates and refunds to be made prior to a determination of the zone allocation issue which was awaiting decision (R. 635-646).

SUMMARY OF ARGUMENT

I. Although Tennessee commenced operations in 1944, the Commission had never prescribed a method by which Tennessee's over-all costs should be allocated among the zones on its pipeline system in arriving at the rates to be charged to its customers in such zones. This important matter had been deferred on prior occasions as a result of rate settlements. Finally, it was agreed by all parties and the Commission to have this issue tried and squarely decided in the Docket No. G-11980 proceeding.

The outcome of this hotly contested issue, which was awaiting decision at the time Staff counsel made his motion for an interim rate order, could have a vital bearing not only on which particular zone rates should be reduced and to what extent, but also on whether certain of the zone rates were in fact excessive. For under some of the numerous methods of allocation proposed, there would be no rate reductions in rates in certain zones even if there were a substantial reduction in the over-all cost of service.

A. Since a decision on the zone allocation issue could have an important impact on the fixing of interim rates, the Court below correctly held that the Commission erred in setting aside Tennessee's rates before deciding the allocation issue. The Commission's action was unlawful because under Section 4(c) of the Natural Gas Act the Commission can set aside rates

only after they are found to be excessive. A determination of which of the particular zone rates were excessive and which rates should be reduced depended not only on a determination of the over-all rate of return issue, but also on the method of allocation to be applied.

The Commission abused its discretion because after it determines the allocation issue, the Commission could find that it had reduced rates by its interim order to a level below that which would be required to enable Tennessee to recover its total cost of service. Since the Commission would have no authority under the Act, in such event, to increase the rates back to the lawful level, Tennessee should have been permitted to collect its filed rates, subject to its obligation to make refunds with 7 percent interest, until the allocation issue was decided.

B. The Commission's reliance on Section 16 of the Act is misplaced. Section 16 merely gives the Commission the means to carry out the authority specifically provided by other sections of the Act. Since rates " * * * can be set aside *only* upon being found unlawful" under Section 4 of the Act, the Commission is without authority to do otherwise under the generality of Section 16 of the Act.

C. Since it was impossible for Tennessee to predict with certainty what the Commission's decision on the allocation issue would be, the Court below properly rejected the Commission's contention that it was justified in requiring Tennessee to reduce its rates at its own peril under the compulsion of the interim

^{10a} *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 342 (1953).

order which failed to prescribe the proper allocation formula to be used for such purpose.

Nor can the Commission's action be justified on the general proposition that a natural-gas company filing rates which fail to provide it with a fair rate of return cannot be heard to complain if the Commission adopts those rates. Such is not the case here because the Commission did not adopt Tennessee's filed rates. Instead, it ordered the filing of different rates which may or may not yield the prescribed fair rate of return, depending on how the Commission may later decide the cost allocation issue.

Additionally, the Commission is in error in contending that the risk is the same whether or not the Commission sets aside the rates prior to a decision on allocation. If the interim order had included a decision as to the proper allocation method to be used, the Commission obviously would have refrained from setting aside those rates which are not excessive. However, by deciding the issue separately, as here, the Commission has set aside and reduced rates in certain zones which, after deciding the allocation issue, it may find to be not excessive or not subject to as large a reduction as that required by the interim order.

D. The Commission could have avoided the problem here involved by omitting the intermediate decision on the zone allocation issue which had already been tried and briefed, as it did with the rate of return issue, and deciding the allocation issue simultaneously with the issue of rate of return.

Another lawful alternative available to the Commission for carrying out its objective, would have been to order an interim reduction in rates and provide that

any subsequent decision on allocation would apply prospectively only. In this way, the rate reduction could have been immediately passed on to the consumers, while at the same time assuring Tennessee that its rates would not be reduced below the amount called for by the Commission's decision on rate of return.

E. The cases cited by the Commission hold only that the Commission may issue interim rate orders in appropriate circumstances. But as the Commission concedes, in none of these cases was there a zone allocation issue awaiting decision at the time of the interim order. Since the Court below does not hold that the interim order procedure is unlawful *per se*, but rather that it was unlawfully applied in this case, the authorities cited by the Commission are inapposite.

F. Subsequent to the interim order issued herein, the Commission decided the allocation issue. Tennessee's estimated revenues, based on the reduced interim rates it was required to file, fall short of recovering the cost of service (at the reduced return) in certain zones by approximately \$1,500,000 based on the Commission's subsequently prescribed method of allocation. The difficulty of foretelling what allocation method the Commission would prescribe is demonstrated by the fact that the method adopted by the Commission is different than any of those proposed by the parties and the Commission's Staff.

II. Since the Commission has now issued its decision on zone allocation, affirmance of the decision of the Court of Appeals would clearly bring about a proper and just result. By setting aside the Commission's interim order, Tennessee's rates would be reinstated. The Commission could then issue a new interim order permitting Tennessee to place in effect reduced rates

as of the date its own rates became effective, but reflecting the Commission's method of allocation. In this way, the overall reduction in rates intended by the Commission would still be effectuated. Tennessee would be assured that the reductions made in each zone would be proper, and the customers in certain zones would not receive a windfall at Tennessee's expense. In other words, the effect of affirmance would be the same as if the Commission had decided the allocation and rate of return issues simultaneously, which is precisely what the Commission should have done in the first place. We fail to see how the Commission could oppose such a result, which would do justice to the consumer and the company alike.

ARGUMENT

There is no question here as to the Commission's authority generally to issue interim rate orders. Neither Tennessee nor the Court below dispute the Commission's authority to issue interim rate orders in appropriate cases. The sole problem here is whether the Commission can issue such an order where there is a zone allocation issue awaiting decision, which could have a crucial bearing not only on which zone rates should be reduced, but also on whether certain zone rates are excessive.

Tennessee would not have opposed an interim rate order prior to the disposition of other phases of the rate proceeding, if there had been no zone allocation issue pending (R. 519-521, 592). In other words, Tennessee was willing to make an interim reduction in rates and refunds, provided that the Commission would determine which zone rates should be reduced and to whom refunds were due in the event it found

upon substantial evidence that a fair rate of return was less than claimed by Tennessee.

The Commission, however, refused to make such a determination (R. 521-23, 535-37). Instead, it required Tennessee to reduce its rates and make refunds (R. 538-39), but subject to a later possible determination, after such rate reductions were made, that certain of the zone rates which Tennessee was required to reduce on an interim basis were in fact lawful in the first instance, or that some of the zone rates were reduced by too much and others by not enough and that Tennessee had made refunds in the wrong amounts to the wrong customers.

A subsequent determination of the method of allocation to be used, retroactively applied, could require Tennessee to make a further reduction in rates as to those rates which had not been reduced enough, but Tennessee would not be permitted to increase those interim rates which had been reduced too much.¹¹ This would mean, therefore, that although Tennessee had already reduced its rates to reflect the approximate \$11,000,000 called for by the Commission's decision on rate of return, the procedure established by the Commission could require Tennessee to make an over-all reduction in rates in excess of the \$11,000,000 applicable to that issue, even though its decision as to rate of return would justify no more than an \$11,000,000 over-all reduction in

¹¹ The Commission interprets the Act as precluding it from increasing rates above those on file with the Commission. *Atlantic Seaboard Corp.*, 11 F.P.C. 43, 63-65 (1952). Since Tennessee's rates were set aside by the interim order, the Commission deems those rates as no longer being on file, even though certain of those rates may be justified based on the later decision on allocation.

rates. In these circumstances, Tennessee would be denied the opportunity to earn the 6½ percent rate of return to which the Commission said it was entitled. For these reasons, Tennessee objected to the interim order procedure as applied in this case, and, for the same reasons, the Court below found the procedure as applied herein to be unlawful and unfair.

I

THE INTERIM ORDER PROCEDURE AS APPLIED IN THIS CASE IS UNLAWFUL AND UNFAIR.

While the Commission concedes that the interim order procedure as applied in this case could result in Tennessee being denied rates which would permit it to earn a "reasonable rate of return," the Commission contends that such procedure is, nevertheless, lawful. Moreover, the Commission argues, there was only a remote possibility of injury to Tennessee (Br. p. 40).

Before dealing with the various arguments made by the Commission and the virtually identical arguments made by the City of Pittsburgh and the Commonwealth of Pennsylvania,¹² we believe it would be helpful to discuss at this juncture in greater detail the background of the zone allocation issue and the relationship of that issue to the matters here involved.¹³

¹² Since the arguments made by the City of Pittsburgh and the Commonwealth of Pennsylvania are almost identical to those made by the Commission, most references herein will be to the Commission's brief.

¹³ Subsequent to the interim order here involved, the Examiner issued his decision on zone allocation which contains an extensive history of that issue, from which the following discussion, as to background is taken. *Tennessee Gas Transmission Company*, Docket No. G-11980, Examiner's Decision issued February 13, 1961 (*mimeo.*, pp. 1-10, unreported). A copy of this decision has been

The Background of the Zone Allocation Issue

Tennessee does not have a system wide rate which applies to all services of a similar character regardless of the location of the sale and delivery of gas. Because of the length of the Tennessee pipeline system, six rate zones and rate differentials among those zones were heretofore established as a result of rate settlements entered into the early 1950's between Tennessee, its customers and the Commission's Staff, with the approval of the Commission.

In these settlements, there were conflicting views among the parties as to the method of allocation that should be used in the future to arrive at the zone rate differentials. In order to reach a settlement, the parties simply agreed to certain zone rates, without agreeing to the method of allocation to be applied in the future, with the understanding that this issue would be litigated in some future rate proceeding. From the time Tennessee first initiated service in 1941 until 1954, its rates had always been arrived at as a result of such rate settlements as approved by the Commission.

During the course of hearings with regard to a rate filing made in November, 1954, the New England zone customers raised the issue of zone allocation. The

adjudge with the Clerk of this Court. On February 13, 1962, the Commission issued its Opinion No. 352 on zone allocation, which, for the most part, adopts the Examiner's decision. *Tennessee Gas Transmission Company*, 42 PUR 3d 145, pending on review *sub nom. Manufacturers Light and Heat Co. v. Federal Power Commission*, CADC No. 17064. The Commission's opinion also sets forth some of the background with regard to the zone allocation issue (42 PUR 3d at pp. 149-50).

Commission directed that such issue be deferred until after the cost of service issues were heard in that case. At the conclusion of the hearings on cost of service, Tennessee moved that the Commission decide those issues and issue an interim rate order based thereon. Tennessee further proposed that any subsequent decision as to zone allocation be applied prospectively only. The Commission granted Tennessee's motion insofar as it requested that a decision be made on the cost of service issues, but it held that it would be "unfair and improper" to issue an interim rate order while the issue of zone allocation was still pending. The reasons given by the Commission for not issuing an interim rate order in that case are the very reasons which the Commission now contends are unimportant.¹ Thus, the Commission there stated:

The pleadings pose the questions of whether it is appropriate and in the public interest for the Commission *at this time and on the present record* to consider and determine separately the issues relating to total cost of service and rate level and to reserve for subsequent decision the issue raised concerning zone rate differentials; and should the intermediate decision procedure be omitted:

* * * * *

Fulfillment of the request of Tennessee that determination be now made as to its total cost of service and the rate level would not only require determination as to the proper method of allocating the "total" between jurisdictional and non-jurisdictional sales, but it would require also present determination as to the proper method

¹ *Tennessee Gas Transmission Company*, Docket No. G-5259, order issued September 29, 1956 (unreported). A copy of this order appears in Appendix B to the Commission's brief (pp. 52-61).

of allocating the jurisdictional portion of the total between the several zones of service, or at least, a determination that the present zone boundaries and rate differentials should be maintained for sales made on and since December 15, 1954, and continuing until final order in this proceeding. It is not possible at this incomplete state of the proceeding to determine proper zone boundaries and what method of allocating costs between zones would be fair and equitable.

* * * * *

Our experience tells us that, if in the future a change in Tennessee's zone boundaries or rate differentials is in order, the effect of the resultant rate on particular customers will differ dependent upon what cost of service is found proper here. *On this record, however, it is not possible to now determine what the effect upon particular customers will be until resolution of the cost of service and zone issues.*

Thus, we are of the opinion that it would be not only premature for us to grant that part of Tennessee's motion requesting that we at this time fix rates to be effective on and after December 15, 1954, it would also be *unfair and improper.*

In January, 1957, Tennessee filed new rates with the Commission in Docket No. G-11980 to recover increases in costs which occurred after its previous rates were filed in 1954. At the time such new rates were filed no decision had, as yet, been rendered by the Commission on the cost of service issues in the previous rate case and no further hearing had been held on the zone allocation issue. Thus, in order to expedite the conclusion of the prior proceeding, Tennessee moved that the Commission dismiss the zone allocation issue in that proceeding and have that issue

squarredly decided and finally resolved in Docket No. G-11980. All parties agreed to this procedure and the Commission granted the motion by order issued September 5, 1957.

After hearings in the Docket No. G-11980 proceeding commenced, the Commission by order issued April 30, 1959, directed that the determination of the allocation issue be expedited, stating that a determination of this issue would aid in the disposition of subsequent cases. To this end, it severed the zone allocation issue for separate and prior hearing and determination in the Docket No. G-11980 proceeding.

Hearings with regard to the zone allocation issue proceeded and were completed in December, 1959. Final briefs on that issue were submitted in April, 1959. Thus, at the time Staff counsel made his motion for an interim order in the case at bar the allocation issue in Docket No. G-11980 was awaiting decision.

It was apparent at the time Staff counsel made his motion that the outcome of the zone allocation issue could have a material effect on any rates fixed in the case at bar, whether such rates were fixed on an interim or final basis. First, as indicated earlier, the Examiner had already ruled that the determination of the allocation issue in Docket No. G-11980 would be controlling in the case at bar (R. 50-51).¹⁵ Secondly, diverse methods of allocation had been proposed which yielded substantially different results in allocating the same total cost of service among the six rate zones.

¹⁵ The Commission has since held that the decision on zone allocation in Docket G-11980 would apply to all future cases, "unless and until it may be demonstrated at some later date that a change is required." *Tennessee Gas Transmission Company, supra*, 42 PUR 3d at p. 150.

(R. 594). The evidence showed that even if there were a substantial reduction in the overall cost of service submitted by Tennessee, there would be no reduction in rates in certain zones depending on the method of allocation selected (R. 597-98).¹⁶ It is, therefore, evident that without also deciding the issue of zone allocation the Commission could not determine, simply on the basis of its decision as to rate of return, which particular rates in the various zones were excessive and the extent to which they were excessive.

Petitioners contend, nevertheless, that the interim order procedure as applied in this case is lawful. In essence, Petitioners argue that Tennessee was not entitled to know which particular rates to reduce and by how much. They assert that Tennessee was required to make rate reductions and refunds at its own peril. For the reasons shown below, Petitioners' arguments are without merit.

A. The Commission Cannot Set Aside Rates Until They Are Found Excessive

The order under review is fatally defective because, without first deciding the zone allocation issue, the Commission could not validly make the statutory finding that the various filed rates, which it ordered reduced, were unjust or unreasonable; nor could it validly determine the rates to be thereafter charged, as required by the Act.

The rates here involved were filed pursuant to Section 4 of the Natural Gas Act. As this Court

¹⁶ For example, although the Staff proposed a substantially lower cost of service than Tennessee in the Docket G 11989 proceeding, one of the proposed methods of allocation as applied to the Staff's cost of service would result in more than \$5,000,000 more costs being allocated to one zone than Tennessee's filed rates could recover (R. 597-598).

explained in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, 342-3 (1956), under Section 4(d) of the Act a natural-gas company is required to give 30 days' notice as to the effective date of the new rates. Under Section 4(e) the Commission has authority within the 30-day period to suspend the effective date of the new rates for five months. In this event, upon motion of the company, the rates then become effective.

Section 4(e) of the Act further provides the Commission with authority * * * to enter upon a hearing concerning the lawfulness of such rate * * * and after full hearings, * * * the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it [the rate] had become effective. * * *. This has been construed¹⁷ as giving the Commission the same authority it has under Section 5(a) of the Act, which provides that, "Whenever the Commission, after a hearing * * * shall find that any rate * * * is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate * * * to be thereafter observed and in force, and shall fix the same by order. * * *"

Unlike Section 5(a), where orders of the Commission have prospective effect only, the Commission may, under Section 4(e) of the Act, make its order retroactive to the date the rates became effective. Thus, the Commission may require the company to collect its new rates subject to a refund obligation and * * * upon completion of the hearing and decision * * * the Commission may require the com-

¹⁷*United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, *supra*; *Hoppe Natural Gas Co. v. F.P.C.*, 196 F. 2d 803, 805 (4th Cir. 1953).

pany * * * to refund, with interest, the *portion of such increased rates or charges* by its decision found not justified. * * *

"As this Court pointed out in the *Mobile* decision, *supra*, the basic authority given the Commission under Sections 4(c) and 5(a) is to set aside and modify rates, but such rates * * * can be set aside *only* upon being found unlawful by the Commission" (350 U.S. at 341-43).¹² Notwithstanding this restriction on the Commission's authority to set aside rates, the Commission argues as follows (Br., p. 20):

"In holding that, in the absence of a Commission decision on cost allocations, there was 'no basis for determining which of the filed rates in specific zones were unlawful' (R. 642), the court below misconceived the test of validity applicable to an interim order. For the test is not whether there can be a resolution of all questions which relate to the lawfulness of the rate but whether the sufficiency of the attempted justification of a component part of the increased rate can be decided separately * * *

The defect in the Commission's argument is that while the rate of return is a separate component of the cost of service and can be decided separately, its decision on rate of return, as a separate issue, only determines the total amount of the reduction in the over-all cost of service. What this means in terms of reduced rates for the respective zones, however, depends on the method selected by the Commission for allocating such over-all cost of service among the zones.

¹² To the same effect see *Colorado Interstate Gas Co. v. F.P.C.*, 142 F. 2d 943, 954 (10th Cir. 1944), affirmed, 324 U.S. 581 (1945).

As stated earlier, Tennessee would not have opposed the interim order procedure in this case if the Commission would have determined which particular rates should be reduced and what refunds should be made to the customers in the various zones, in the event it found upon substantial evidence that a fair rate of return was less than claimed by Tennessee. What Tennessee objected to was the Commission's procedure which subjected Tennessee to the hazard of being later required to make further retroactive rate reductions (after decision of the zone allocation issue) in excess of the amount necessary to reflect the reduction in rate of return and, thereby, depriving Tennessee of the rate of return which the Commission found proper.

B. Section 16 of the Act Does Not Empower the Commission To Do Acts Which Are Beyond Its Authority Under Other Sections of the Act

As support for its authority to issue the interim order here involved, the Commission relies heavily on Section 16 of the Natural Gas Act which provides it with authority to issue rules, regulations and orders "as it may find necessary or appropriate to carry out the provisions of" the Act (Br., pp. 17, 50). The Commission argues that a primary aim of the Act is consumer rate protection, and, hence, it has authority under Section 16 of the Act to carry out that aim (Br., p. 17). But, as the Commission has observed on a prior occasion, "this Section does not * * * grant the Commission any power to issue an order which does not have its genesis elsewhere in the act." *Willmut Gas and Oil Co. v. United Gas Pipe Line Co.*, 12 F.P.C. 132, 142 (1953); Cf. *F.P.C. v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 508 (1949).

For example, the Commission under the rate provisions of the Act, Sections 4 and 5, could not order a rate reduction without notice and hearing. While noncompliance with notice and hearing requirements may expedite rate reductions, this does not mean that the Commission has authority to issue such an order under Section 16 of the Act. Section 16 merely gives the Commission the means to carry out the authority provided by other sections of the Act. Thus, whether or not the Commission had the authority to issue the interim rate order here involved does not depend on the interpretation of Section 16 of the Act, but rather on the rate provisions of the Act, namely Sections 4 and 5. For, the question in this case is not whether the Commission has authority to issue interim orders in appropriate cases, but whether its order meets the standards imposed by Sections 4 and 5 of the Act. Thus, if rates " * * * can be set aside *only* upon being found unlawful" under Sections 4 and 5 of the Act, the Commission is without authority to do otherwise under Section 16 of the Act.

C. The Commission's Attempted Justification for the Interim Order Procedure as Applied Herein Is Without Merit

The Commission asserts that since Tennessee has the burden of proof under Section 4(c) of the Act, it was justified in ignoring the evidence before it on the zone allocation issue and in reducing Tennessee's rates prior to the disposition of that issue. While the Commission recognizes that this may result in Tennessee being unable to earn a fair return, it argues that the Commission has no obligation under the act to guarantee Tennessee a fair return. Moreover, the Commission argues, Tennessee itself may file rates which yield an inadequate return and the interim order procedure as applied herein does not increase that risk. Thus, the Commission claims, it was justified

in requiring Tennessee to reduce its rates at its own peril pending the decision on the zone allocation issues (Br., pp. 26-28).

While it is true that the Commission does not guarantee Tennessee that it will earn a fair rate of return, since this depends, in part, on the amount of business that Tennessee will do in the future, it is well established that a regulated company is entitled to an opportunity to earn a fair return. *Bluefield Waterworks and Improvement Co. v. Public Service Commission of West Virginia*, 262 U.S. 679, 692 (1923). The procedure employed by the Commission herein, however, could deprive Tennessee of such an opportunity by setting aside certain of the zone rates which the Commission may later find (1) should not have been reduced at all, or (2) should have been reduced to a lesser extent than required by the interim order.

Nor can the Commission's action be justified by the possibility that, even in the absence of an interim order, Tennessee's filed rates may be too low in some zones to yield a fair rate of return. The Commission argues that since Tennessee has such a risk at the outset, the interim order does not increase that risk (Br., p. 26).

It is true that a natural-gas company may file rates which in the aggregate are too low to yield a fair rate of return. In those circumstances, the injury to that company would be the result of its own act. Such is not the case here. In the case at bar it is the Commission's action, rather than any act on the part of Tennessee, which would deprive it of rates yielding a fair rate of return. Cf. *F.P.C. v. Sierra Pacific Power Co.*, 350 U.S. 348, 355 (1956).

Moreover, the Commission is in error in contending (p. 26) that the risk is the same whether or not the Commission decided the allocation issue simultaneously with the issue of rate of return. When the Commission decides the issues simultaneously, either on an interim order basis or at the conclusion of the proceedings, and finds that some of the rates are below that necessary for a fair return, obviously it would not set aside those rates as being excessive. Also, Tennessee could then correct the rate upward to a lawful level. But by deciding these issues separately as here, the Commission could set aside and reduce rates which not only are not excessive, but which are below a lawful level. Tennessee, in such circumstances, is also denied the opportunity of correcting the rate to a lawful level until the allocation issue is decided. Thus, the interim order procedure as applied herein clearly exposes Tennessee to much greater risk than if these issues were decided simultaneously.

Requiring Tennessee to reduce its rates at its peril by guessing what the outcome of the allocation issue will be is particularly unfair in light of the history of that issue. As explained earlier, the Commission had never previously determined a method of zone allocation for the Tennessee system. Nor had it in any other case prescribed a zone allocation formula to be applied in all cases. Thus, the issue was wide open and what the outcome of that issue would be was anybody's guess. As this Court has aptly observed, allocation of costs " * * * is not a matter for the slide rule" but instead "involves judgment on a myriad of facts". *Colorado Interstate Gas Co. v. F.P.C.*, 324 U.S. 581, 589 (1945).

The importance of a decision on this issue in pending and future rate cases is clearly shown by the Commission's Opinion on zone allocation subsequently

issued in Docket No. G-11980, wherein the Commission stated (*Tennessee Gas Transmission Co., supra*, 42 PUR 3d at 149):

"The selection of appropriate methods of cost allocation and the explication of the underlying principles by which such methods can be evaluated are among the most important responsibilities of this commission. Although eighteen years have elapsed since Tennessee was granted its original certificate, this is the first case in which the allocation issues arising out of the complex operation of the Tennessee system have been fully heard and presented to the commission on a complete record. *Since the allocation method is a fundamental part of every pending and future Tennessee rate case, it is imperative that these basic issues be determined herein.* * * *

A zone allocation issue is principally a contest among customers, since the problem involved is not the total cost of service, but how that total cost should be divided among customer zones. The pipeline is obviously most concerned with recovering its total cost of service regardless of how such total is divided. As could be expected, the customers in each rate zone sponsored or favored a method of allocation, which allocated the least part of the total cost to that zone. For this reason, diverse and complex methods of allocation were submitted, which yielded substantially different results for a particular zone.

The Commission's contention that, because Tennessee has the burden of proof, it may set aside the rates and ignore the contested allocation issue, which may have a crucial bearing on the rates being set aside, is clearly without merit. As the Commission itself held in its Opinion on the allocation issue, once the evidence on allocation has been presented, it is

bound to arrive at a method of allocation on the basis of the entire record *regardless of who presented the evidence and who has the burden of proof*. *Tennessee Gas Transmission Company, supra*, 42 P.U.R. 3d at 149.¹⁹

The unfairness of the Commission's procedure is particularly acute where an issue as to zone allocation has been raised and sharply contested; and where, as here, no prior decision as to zone allocation has been rendered. The difficulty of foretelling what the outcome of such an issue will be is demonstrated by the fact that the Commission ultimately selected a method of allocation which was different from any of those presented by the parties. In these circumstances, the contention by the Commission that it was justified in requiring Tennessee to reduce its rates at its own peril prior to deciding the allocation issue is clearly without merit. Such a procedure relegates rate-making into a poker game in which only the pipeline can be the loser. The Commission's function is to arrive at lawful rates—not to employ procedures which may saddle a company with rates which cannot recover the cost of service.

In arguing that Tennessee has the burden of proof, the Commission overlooks its own obligations under the Act. As stated earlier, the Commission is required to hold a "full hearing" with regard to the rates and can set aside the rates "only upon being found unlawful." In setting aside rates, it is the Commission's obligation, not Tennessee's, to determine which rates are excessive, the extent to which they are excessive and what refund should be made. Since the Com-

¹⁹ Cf. *American Louisiana Pipe Line Company*, F.P.C. Opinion No. 363 (1962; unreported).

mission cannot make such a decision prior to the determination of the allocation issue, it cannot lawfully require Tennessee to reduce its rates at its own peril subject to a retroactive determination that Tennessee had reduced the wrong rates and made refunds to the wrong customers.

The contention of the Commission (Br., pp. 30-31), that the decision below would preclude the Commission from ever issuing interim rate orders and would require the Commission to decide all phases of the rate proceeding prior to issuing a rate order, is plainly incorrect. Where there is conflicting evidence before the Commission as to the lawfulness of the rates, the Court below merely requires that the Commission decide those matters necessary to determine whether the rates are lawful. In the case at bar, this required only a decision on the allocation issue pending before the Commission as well as the issue of rate of return, and would not, as the Commission claims, require the Commission to decide all phases of the rate proceeding prior to issuing an order as to rates.

Indeed, the Commission has experienced no difficulty in applying the interim order procedure since the issuance of the decision below. Recently, the Commission granted a motion by its Staff to invoke the interim order procedure in a rate proceeding involving El Paso Natural Gas Company, wherein the Commission's Staff urged:

... * * the *Tennessee* decision (*Tennessee Gas Transmission Company v. F.P.C.*, 293 F. 2d 761) is distinguishable from these proceedings in that

²⁰ *El Paso Natural Gas Company*, Docket No. G-4769, *et al.*, order issued December 27, 1961. A copy of this order is attached as Appendix A to Tennessee's Brief in Opposition to the Petitions for Certiorari.

here there are no other issues ripe for decision whereas in *Tennessee* the basis of the court's refusal to allow the interim order to become effective was the fact that *the allocation issue was ripe for decision*; * * *

D. The Commission Had Lawful Alternatives Available for Carrying Out Its Objective

The Commission could have avoided the problem here involved by omitting the intermediate decision on the zone allocation issue which had already been tried and briefed, as it did with the rate of return issue, and deciding the zone allocation issue simultaneously with the issue of rate of return. In this way an interim rate order could have been lawfully issued prior to the disposition of other phases of the proceeding, and if the rate of return was reduced, Tennessee would have known which particular rates should be reduced and to what extent.

While a decision on zone allocation would have entailed a short delay in the issuance of an interim rate order,²¹ the consequences of such a delay would

²¹ The Commission (Br. pp. 37-8) asserts that it was unable to reach a decision on allocation until February 6, 1962, approximately 18 months after the interim order, and that it required two oral arguments before it could reach its decision. What the Commission fails to point out, however, is that this inordinate delay was caused by its own failure to omit the intermediate decision. Tennessee advised the Commission when it requested omission of the intermediate decision that the Examiner had informed all parties that he would be unable to begin working on his allocation decision for some months because of his involvement in other cases (R. 519-52). After the Examiner issued his decision, there was further delay caused by the appointment of new commissioners resulting from the change in administrations. Thus, after one oral argument, there was a reargument before the new commissioners in September, 1961. It took the new Commission in the ordinary course only 5 months to decide the issue from the time of oral argument.

have been negligible. The reduction in rate of return when translated into reduced rates for the average household consumer amounts to approximately 15¢ per month in a gas bill. Thus, awaiting the outcome of the allocation issue would have required that the average householder pay approximately 15¢ per month, subject to refund with 7% interest, until the allocation issue was decided.²² On the other hand, by requiring Tennessee to reduce its rates prior to a decision on the zone allocation issue, the Commission exposed Tennessee to the possibility that it would be unable to recover millions of dollars of its out-of-pocket costs in rendering service to certain zones.

The Commission argues, however, that it was justified in not omitting the intermediate decision on the allocation issue because of the complexity of that issue. Even assuming *arguendo* that this is correct, this does not mean that the Commission can issue an interim rate order prior to the resolution of the inter-related allocation issue. The Court below does not hold that the Commission erred in failing to omit the intermediate decision on allocation, but rather it holds that the Commission did err in setting aside Tennessee's rates prior to the time that they could be determined to be unlawful.

The Commission also asserts (Br., pp. 32-33) that although Tennessee is obligated to make refunds with 7% interest, the refund provision in the Act is an

²² Tennessee's total annual deliveries of natural gas in the test year ending July 31, 1959 were approximately 700,000,000 Mcf. Thus, the \$11,000,000 over-all reduction amounts to approximately 1.7¢ per Mcf on a straight volumetric basis. The average residential consumer uses approximately 104 Mcf of gas annually or approximately 9 Mcf on a monthly average basis. *American Gas Association, Gas Facts for 1960*, page 96.

imperfect mechanism and an inadequate substitute for the interim order procedure. In this regard, the Commission erroneously contends that the refund provision was not intended for consumer protection, but was intended to permit the natural gas company to collect its rates subject to refund pending a determination as to lawfulness (Br., p. 35).²³

Apart from other fallacies in the above argument, the short answer is that if the Act entitled Tennessee to collect its rates pending a determination as to lawfulness, the Commission cannot ignore this requirement, regardless of its views as to possible inadequacies of the refund provisions of the Act. Whether or not the interim order procedure is a desirable tool for expediting rate cases is beside the point. The Court below does not hold that the interim order procedure is unlawful *per se*, but rather that it was unlawfully applied in this case.

Moreover, there were still other lawful alternatives available to the Commission which would have permitted it to carry out its objective. The Commission could have ordered an interim reduction in rates, but held that any new method of allocation subsequently adopted would apply prospectively only, in arriving at zone rates. In this way the rate reductions, if any, could immediately be passed on to the consumers. At the same time, Tennessee would be assured that to the

²³ The contention that the refund provision in Section 4(c) of the Act was not intended for consumer protection is clearly incorrect. Congress was aware that an unreasonable suspension period would be unconstitutional. *Hopie Natural Gas Co. v. F.P.C.*, 196 F. 2d 803, 809 (4th Cir. 1952). Thus, in order to protect the consumer while the case was pending after the suspension period, it enacted the refund provision. Cf. *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378, 390 (1959).

extent that it had made the over-all reduction in rates ordered by the Commission, that reduction would be final as to the issue decided.²⁴

The operation of the above type of interim order would have been the same as that approved by the Seventh Circuit and later by this Court in the *Natural Gas Pipeline* case²⁵ cited by the Commission (Br., p. 22). There the Commission in a Section 5(a) investigation heard evidence as to rate of return and issued an interim order requiring the pipeline to reduce its rates without prescribing the method of allocation. However, since the Commission orders under Section 5(a) have prospective effect only, a subsequent order as to allocation would have had no retroactive effect on the interim reduction. In approving this procedure, the Court of Appeals noted that while the action of the Commission was "irregular" and "unusual," it was in no way "harmful" to the pipeline (120 F. 2d at p. 631).

E. The Commission Has No Judicial Sanction For Applying the Interim Order Procedure in a Case Such as This

In addition to the *Natural Gas Pipeline* case, *supra*, which is obviously distinguishable from the type of interim order issued herein, for the reasons discussed above, the Commission cites (Br., pp. 22-25) as authority the decisions in *Panhandle Eastern Pipe Line Co. v. F.P.C.*, 236 F. 2d 606 (3rd Cir. 1956), and *State Corporation Commission of Kansas v.*

²⁴ As Tennessee indicated to the Commission, it would have no objection to this type of interim rate order (R. 599).

²⁵ *Natural Gas Pipeline Co. v. F.P.C.*, 120 F. 2d 625, 631 (7th Cir. 1941); reversed on other grounds, *F.P.C. v. Natural Gas Pipeline Co.*, 315 U.S. 575, 584 (1942).

F.P.C., 206 F. 2d 690 (8th Cir. 1953), which involved interim rate orders issued under Section 4(c) of the Act.²⁶

The Commission concedes, however, that the issue here involved was not raised or decided in the above cases (Br. 29-30). Indeed, in neither of the above cases was there an interrelated allocation issue awaiting decision at the time of the interim order. The Commission contends only that the interim orders in these cases did not preclude the possibility of such an issue being raised at a later stage of the proceeding (Br. p. 30). Since the above hypothetical possibility was not raised on review and therefore not considered, these cases can hardly be regarded as authority for the issue here involved. Moreover, the possibility that an allocation issue might have been raised in the future is a far cry from the facts here involved where the issue was not only actually raised, but heard, briefed and awaiting decision at the time of the Commission's interim order.

The backgrounds of the *State Corporation Commission* case (involving Northern Natural Gas Company) and the *Panhandle* case are similar. In each of the above cases, the Commission issued interim orders dismissing rate filings by those companies insofar as the filings raised issues which had just been decided in prior proceedings involving the same companies. In the case of *Panhandle*, the Commission, just 75 days prior to the interim order, had decided rate design

²⁶ The Commission also cites a number of other cases (Br. p. 22) purporting to show that courts have approved measures similar to the interim order. But none of these cases establish that the Commission may set aside rates prior to the time that they can be found unlawful. These cases, therefore, are inapposite.

and zone allocation issues for the Panhandle system. The interim order made it clear that the Commission would not retry these issues and that the interim reduction in rates should be based on the same allocation methods just decided (See 236 F. 2d at p. 611). Thus, as the Court pointed out, the issues decided on an interim basis were "severable" (236 F. 2d at 608).

Northern, on the other hand, had single system-wide rates and, therefore, no allocation to zones was necessary. Insofar as allocation of costs between jurisdictional and nonjurisdictional customers was concerned, the Commission dismissed that issue since a method of allocation had just been prescribed in the previous case. Thus, in ordering the interim reduction, the Commission set forth the allocation factors to be used. *Northern Natural Gas Company*, 11 F.P.C. 278 and 11 F.P.C. 1324, 1327-29 (1952).

F. The Commission's Contentions With Regard to the Remoteness of Injury to Tennessee Are Without Merit

While the Commission considers the probability or improbability of injury to Tennessee stemming from the interim order procedure as applied herein to be immaterial to the issue involved, it claims that there was no justification for assuming that Tennessee would be injured, because such a possibility was

²⁷ The City of Pittsburgh (Br. p. 22) contends that in the above two cases there remained allocation issues to be disposed of. In the *Panhandle* case the only allocation issue remaining was a special allocation problem dealing with Panhandle's hydrocarbon extraction operations. Any change in this allocation subsequently would only result in a further reduction in rates and not an increase in the rates as would be the case here. As to the *Northern* case, we know of no allocation issue that was pending. The Commission in its brief only claims that such an issue might have been raised after the interim order.

remote (Br., pp. 39-41). As support for this contention, the Commission notes that at the time of the Commission's interim order there remained substantial cost of service questions to be considered in the second phase of the proceeding. Additionally, the Commission refers to the fact that recently the Examiner issued his decision on the second phase of the proceeding recommending a further reduction of \$25,000,000 in the cost of service. The Commission claims that if his decision is upheld, the interim rates are adequate to recover the cost allocated to zones based on the method of allocation subsequently prescribed by the Commission (Br., p. 41).

In the first place, the Examiner's recommendation is not final and Tennessee has filed extensive exceptions to his recommendation which are now pending before the Commission. If certain of these exceptions are granted, Tennessee will not be able to recover its cost of service in certain zones if the Commission's method of allocation is retroactively applied.

Secondly, the Commission's order must be reviewed as of the time it was issued and, therefore, the Examiner's subsequently issued decision has no bearing on the issue. As shown by the record, there was a substantial possibility at the time of the interim order that Tennessee would be unable to recover its cost of service based on proposed methods of allocation then pending before the Commission (R. 597-599).

Indeed, Tennessee's estimated revenues based on the interim rates it was required to file, fall short of recovering the cost of service (at the reduced return) in the New England zone by approximately \$1,500,000 based on the Commission's subsequently prescribed method of allocation (Appendix A, hereto).

II

**AFFIRMANCE OF THE DECISION BELOW WOULD BRING ABOUT
PROPER AND JUST RESULT**

As stated earlier, on February 6, 1962, the Commission issued its decision in Docket No. G-11980 determining the method of zone allocation to be used for the Tennessee system. *Tennessee Gas Transmission Company, supra*. It is clear from the Commission's Opinion (42 PUR 3d at 150) and from the Examiner's ruling previously mentioned (R. 50-51), that the method of allocation adopted by the Commission will apply to the case at bar.

Since the Commission has now issued its decision on zone allocation, affirmance of the decision of the Court below would clearly bring about a proper and just result. By setting aside the Commission's interim order, Tennessee's filed rates would be reinstated. The Commission could then issue a new interim order permitting Tennessee to place in effect reduced rates as of the date its own filed rates became effective, but reflecting the method of allocation which the Commission has now decided to be proper.²⁸ In this way, the over-all reduction in rates called for by the Commission's reduction of the rate of return claimed by Tennessee would be effectuated. Tennessee would then be assured that the reductions made would be proper. This would simply prevent customers in certain zones from receiving a windfall at Tennessee's expense. In other words, the effect of affirmance would be the same as if the Commission had decided

²⁸ Since the Commission's allocation decision is pending on review in *Manufacturers Light and Heat Co. v. F.P.C.*, CA-DC No. 17064, we would not oppose the mandate of the court below being held in abeyance until the review proceeding in the above case is completed.

the allocation and rate of return issues simultaneously, which is what it should have done in the first place. We fail to see how the Commission could oppose such a reasonable and lawful result.

CONCLUSION

For the reasons set forth herein, we respectfully urge that the judgment of the Court of Appeals should be affirmed.

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APPENDIX A

The following shows: (1) The estimated revenues based on the interim rates Tennessee was required to file with (2) the cost of service (at the reduced return) submitted pursuant to the Commission's interim order²⁹ allocated to zones by the Commission's subsequently prescribed method of allocation. Column (3) shows those zones in which there is a deficiency in recovering the allocated cost.

Zones	(1) Revenues at Interim Rates	(2) Allocated Cost	(3) Deficiency
Southern	\$32,335,232	\$32,339,538	\$ 4,306
Central	21,698,723	21,769,055	70,332
Eastern	78,927,166	78,737,926	
Northern	57,110,143	56,681,448	
New York	43,341,853	42,721,460	
New England	32,937,267	34,366,150	1,428,883
Total Deficiency			\$1,503,521

²⁹ Excludes costs related to jurisdictional transportation services and non-jurisdictional sales and transportation. The revenues shown for the New York zone, column (1), include approximately \$156,000 for sales to Trans-Canada, which the Commission did not include in Appendix C to its brief.